

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

74-2410

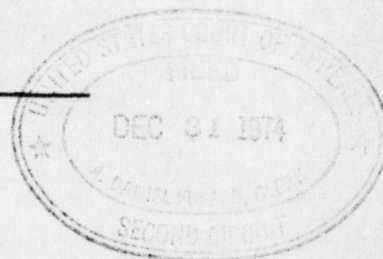
UNITED STATES COURT OF APPEALS
For the Second Circuit

BERNARD KAMHI,
Plaintiff-Appellant,

-against-

MANNIE COHEN,
Defendant-Appellee,

APPELLANT'S REPLY BRIEF



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-----X

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Docket No. 74 2410

-against-

MANNIE COHEN,

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APPELLANT'S REPLY BRIEF

Appellant is at a loss to know on what ground he could appeal from the order of Judge Neaher that states:

"ORDERED, that the motion of defendant to dismiss the complaint for failure to state a claim against the defendant upon which relief can be granted, be and the same hereby is denied."

Thus appellant concludes that as to the Receiver, the complaint is upheld as stating a good cause of action.

Certainly it in no way supports the appellee's conclusion that this judgment of the Supreme Court of the State of New York for the County of Kings has been found by the Court below to be a valid in personam judgment against plaintiff-appellant in the light of the law as defined by the Court of Appeals of the State of New York, and the Supreme Court of the United States.

As Mr. Justice Frankfurter said in Williams v. North Carolina, 325 U.S. 225, at p. 231:

"For domicil is the foundation of probate jurisdiction as it is that of divorce."

The complaint alleges that the plaintiff was domiciled in Nevada prior to any attempt to serve him in a New York divorce action and on a motion to dismiss, that allegation and all it intends must be accepted as fact.

It is even more inexplicable that defendant seeks to support the gratuitous statement that the judgment is in personam (Appellee's Brief, p. 2, under issues) by citing the Appendix, p. 24 A, wherein appears the Finding of Fact of the New York Supreme Court:

"That defendant (plaintiff-appellant here) departed the jurisdiction of the State of New York."

Although the Finding purposely omits to fix the date on which defendant-appellant had departed New York jurisdiction, it is alleged in the complaint to have occurred prior to October 18, 1973, and the service of summons in the action for divorce in the Supreme Court of the State of New York, County of Kings, was not made until December 6, 1973 in the State of Nevada, where defendant (plaintiff-appellant here) had already established his domicil.

Furthermore, it is a misstatement of fact for the appellee to state in his brief (p. 4) that plaintiff's action herein is to set aside Shirley Kamhi's judgment of divorce.

Plaintiff concedes that it is an in rem decree and has not attacked the same as such, although prior thereto he had secured a valid in rem decree of divorce in Nevada, as alleged in

the complaint.

Plaintiff even recognizes that there are circumstances in which a valid in rem judgment of divorce can be obtained by one party in one state and the other party in another state. But both are in rem decrees.

IN ANSWER TO POINT I
OF APPELLEE'S BRIEF

Domestic Relations Law of the State of New York, Section 232, goes no further than to authorize a judgment of divorce altering the marital status of the parties, and any financial provisions are not enforceable against property and earnings outside the State of New York, or within the State of New York, if never seized or attached before entry of the in rem judgment.

Section 313 of New York Civil Practice Law and Rules is applicable only to persons domiciled in New York or subject to its jurisdiction under 301 or 302. Section 301 CPLR does not attempt to create newly extended jurisdiction. Section 302 CPLR, the so-called long arm statute, does not include matrimonial actions.

Whitaker v. Whitaker, 32 App.Div. 2d (N.Y.) 595. In that case the New York Appellate Division held:

"While CPLR 302 expanded the circumstances in which in personam jurisdiction might be obtained, its effect is limited only to the situations enumerated therein, and matrimonial actions are not included."

In Tarshish v. Tarshish, 27 App.Div. 2d (N.Y.) 909,
the Appellate Division held:

"Although the matrimonial domicile of the parties was in this State and the plaintiff resides here, CPLR 302 is inapplicable to permit the court to exercise personal jurisdiction over the defendant. Of course, the court has in rem jurisdiction to grant a judgment of separation and may award alimony and counsel fees payable out of any property of defendant duly sequestered within the State. Concur--Eager, J.P., Steuer, Capozzoli, Rabin and McNally, JJ."

Cockrum v. Cockrum, 20 App.Div. 2d (N.Y.) 642.

This principle of law was upheld herein by the denial of the appellee's motion to dismiss the complaint for failure to state a claim against defendant upon which relief can be granted, on which motion the facts alleged must be accepted as true.

The complaint alleges that plaintiff, when served in Nevada, was not domiciled in the State of New York or subject to its jurisdiction, and this issue recognized as such by Appellant's Brief, p. 5, under Point I, must, on the motion to dismiss the allegation of the complaint, be given full acceptance.

Again, appellant repeats he does not seek to set aside any judgment of divorce in Kings County but only to establish it as an in rem decree limited to territorial (New York) effect. Appellee's broad assertions have unfortunately compelled plaintiff-appellant to argue in support of the unappealed-from decision in his favor in the Court below.

IN ANSWER TO POINT II
OF APPELLEE'S BRIEF

We concede no receiver has "carte blanche" authority to do as he pleases. But he is the receiver of the Court and cannot rise above the Court's jurisdiction. To answer appellee's challenge, if Shirley Kamhi had been appointed Receiver, she would have been sued only in her fiduciary capacity as an appointee of the Court.

IN ANSWER TO POINT III
OF APPELLEE'S BRIEF

When, jurisdiction and thus domicile is the issue, it is hardly possible, as appellee argues, that Williams v. North Carolina, (2) 325 U.S. 226, is to be found "relatively meaningless."

It is not true that plaintiff-appellant's action in this Court has as its sole purpose this attack in the Federal Court. The reason is all the reasons that diversity of citizenship is ground for choosing Federal jurisdiction. The action to set aside the attempted but tardy seizure by the Receiver could be raised, and the issue of domicile and jurisdiction in New York State Courts as well, but extra-territorial jurisdiction of the decree of a New York Court and the United States Constitutional issue relating thereto, was more appropriately brought in the Federal Courts.

Respectfully submitted,

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